No. 1254 SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 30678

JOSEPH LAPI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK A. LOPEZ and
THEODORE ROSENBERG,
Attorneys for Petitioner,
133 Schermerhorn Street,
Brooklyn 1, New York.
Tel.: 212 UL 8-0589

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	4
CONCLUSION	7
APPENDIX:	
Statutes Involved	1-A

CASES CITED

Carroll v. United States, 267 U.S. 132	6
Henry v. United States, 361 U.S. 98	6
McDonald v. United States (335 U.S. 451)	7
Preston v. United States, 376 U.S. 364	6
Staples v. United States, 320 F.2d 817	6
United States v. Beigel, et al., 370 F.2d 751 (1967)	1
United States v. Di Re, 332 U.S. 581	6
United States v. Harris, 321 F.2d 739	6
United States v. Smith, 308 F.2d 657	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 30678

JOSEPH LAPI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Joseph Lapi, respectfully petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, *United States* v. *Beigel, Lapi and Verzino,* 370 F.2d 751 (1967).

Opinion Below

In the Appendix for the United States of America submitted in the Court below, the decision of the Hon. Edward Weinfeld, United States District Judge rendered on May 11, 1966, is reported on page 94a; and the decision rendered on April 13, 1965, by the Hon. Edmund L. Palmieri, United States District Judge, is reported on page 118a. The opinion rendered by the United States Court of Appeals for the Second Circuit is reported as *United States* v. *Beigel, et al.,* 370 F.2d 751 (1967).

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1967. A timely petition for rehearing *En Banc* was denied on February 10, 1967. An application for an extension of time to submit the herein petition for a writ of certiorari was granted by the Hon. John M. Harlan, Associate Justice of the Supreme Court, extending to and including April 11, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1) Whether there was probable cause to subject Alvin Beigel, the co-defendant, to a search and seizure, notwithstanding that a warrant was concededly and judicially adjudicated legally defective, and at a hearing in a State Court the motion to *suppress* the evidence was granted?

2) Whether the petitioner, Joseph Lapi, has legal standing to derive the benefit if Beigel's appeal to this Court results in the reversal of his conviction upon the ground that the evidence seized from Beigel was obtained by an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution, notwithstanding that Lapi did not actually move nor join in Beigel's pretrial and trial motions to suppress the evidence seized from his person as the product of an illegal search and seizure?

3) Whether the evidence adduced at the trial in respect to Lapi, requires a directed verdict of acquittal consonant with the concept of due process of law of the Fifth Amendment of the United States Constitution?

Statutes Involved

The statutes involved are set forth in Appendix A, *infra*.

Statement

The indictment charged petitioner, Joseph Lapi, and four others, Alvin Beigel, Anthony Verzino, Anthony Cutillo and Vincent Soviero, in three separate counts. The first with violations of sections 173 and 174 of Title 21, United States Code. The second count charges a conspiracy to violate sections 4705(a) and 7237(b) of Title 26. The third count charges the defendants with conspiracy to violate sections 173 and 174 of Title 21, United States Code.

The co-defendants, Vincent Soviero, gained a severance and Anthony Cutillo was acquitted at the conclusion of the trial. All defendants waived a trial by jury.

Joseph Lapi was found guilty of counts 1, 2 and 3 as charged in the indictment. On June 17, 1966, the Hon. Edward Weinfeld sentenced him to terms of 7½ years for each count to run concurrently with each other.

A notice of appeal was filed on June 17, 1966, and on January 9, 1967, the judgment was unanimously affirmed by the Court of Appeals.

The petitioner, Joseph Lapi, is presently confined under the custody and jurisdiction of the Attorney General of the United States.

Beigel received a term of 7½ years and Verzino was sentenced to 12 years imprisonment.

Reasons for Granting the Writ

The government's evidence adduced at the trial, solely in connection with the petitioner, Lapi, substantially disclosed that at 8:30 P.M. on March 21, 1963, four years preceding trial, Lapi was observed entering a Rambler automobile, drove to 58th Street off Sutton Place, emerged and proceeded on foot to the Cheer Club, located on Second Avenue between 57th and 58th Streets in New York City. Lapi was thereafter observed conversing briefly with the driver of a car parked nearby and then Lapi entered the back seat. The car was driven to the vicinity of the parked Rambler, where the driver was observed handing a brown paper bag to Lapi, who walked over to the Rambler and allegedly placed the package therein.

The foregoing fundamentally constitutes the case against the petitioner Joseph Lapi.

The person that Lapi allegedly received the brown package from was Anthony Cutillo. However, Cutillo was acquited. All other episodes involving the surveillance of the co-defendants, preceding the initial observance of Lapi, does not in any manner reflect upon or incriminate Lapi. There is not a scintilla of evidence that Lapi had communicated with any of the co-defendants. He merely conveyed a closed package twenty feet to a parked car and allegedly placed the package therein. There is no evidence that Lapi had knowledge of its contents. This brief incident can readily lend itself to the theory that Lapi had unwittingly conveyed a package to an automobile at the request of someone he knew. Upon such premise Lapi, too, should have been acquitted in accordance with due process of law.

Surveillance of the Rambler, the car Lapi allegedly had placed the brown paper bag in, was maintained by Federal Agents. At 2:00 A.M. the following day Beigel was observed to enter the car and drive off. Beigel was followed

to 37-41 79th Street in Queens, got out and went into the building carrying a brown paper bag. When Beigel inserted his key into the lock of the door of apartment 2-C, and as he was about to enter, he was descended upon by police officers. At this critical juncture it is controversial as to whether Beigel was placed under arrest or whether he was first searched and then placed under arrest. The police authorities possessed a warrant to search Beigel. However, in Queens County Supreme Court, the warrant was controverted and adjudicated legally defective and the evidence obtained from the unlawful search was suppressed.

It is respectfully submitted that the evidence adduced at the trial in the light most favorable to the government does not sufficiently support the requisite probable cause to justify an arrest without a warrant.

There certainly did not exist any probable cause to arrest the petitioner, Lapi. His actions and the overheard fragmentary conversations were innocuous. There was no probable cause that Lapi had committed a crime. The basic charge is that Lapi was a principal participant in Beigel's culpability. If Beigel was subjected to an unreasonable search and seizure and the contraband is suppressed, Lapi has standing in such suppression upon the doctrine of due process of law.

The writ should be granted because of the lack of evidence against the petitioner, Lapi, and that Beigel was subjected to an unreasonable search and seizure and therefore the brown paper bag should be suppressed. Lapi has standing by virtue of the allegation that he was an accomplice of Beigel and that a mutual responsibility exists.

Judge Weinfeld, in regard to his verdict, indicated that he completely eliminated the evidence of narcotics and paraphernalia found in Beigel's apartment in Queens from consideration. The case, therefore, centered exclusively upon

the brown paper bag containing a quantity of narcotics found on the person of Alvin Beigel. The government contended that the package found on Beigel was unquestionably the same package that Lapi allegedly placed into a Rambler car which Beigel drove to Queens.

On March 21, 1963, Lapi was observed for the first time by the police authorities in connection with the instant case. None of the incidental surveillances of the co-defendants even remotely alludes to Lapi. If in fact, Lapi's participation would not constitute probable cause for arrest or search and seizure without a warrant, then it follows that when Beigel was tailed when he drove the Rambler to Queens and emerged carrying a brown paper bag, that there did not exist probable cause for his arrest without at valid warrant. *Staples* v. *United States,* 320 F.2d 817.

The warrant in the instant case was fatally defective and therefore without force or effect. A search without a warrant is unreasonable except when it is incidental to a lawful arrest and contemporaneous therewith as to time and place. *Preston* v. *United States,* 376 U.S. 364; *Carroll* v. *United States,* 267 U.S. 132. The arrest cannot be used as an excuse to search for evidence. *United States* v. *Di Re,* 332 U.S. 581; *United States* v. *Harris,* 321 F.2d 739.

There was evidence to the effect that several months preceding the day of arrest, Beigel had been subjected to police search and seizure and released when no evidence of a crime was found. These fishing expeditions certainly are proscribed by the Fourth Amendment. These events certainly depreciates the efficacy of probable cause unless the police have a valid warrant. A bad search is not made good by what the search turns up. *Henry* v. *United States,* 361 U.S. 98; *United States* v. *Smith,* 308 F.2d 657.

Lapi's conviction was predicated solely upon the seizure of narcotics found on Beigel. It was not alleged that Lapi

had sold narcotics to Beigel. The government contended that Lapi and Beigel functioned as partners in the possession of narcotics in violation of the charges set forth in the indictment. Each action concerning the package found on Beigel was deemed attributable to Lapi. Upon such premise Lapi has legal standing to assail the constitutional propriety of the narcotics seized from Beigel. *McDonald* v. *United States* (335 U.S. 451).

The co-defendant Alvin Beigel, has petitioned for a writ of certiorari and submitted a certified record from the Court of Appeals in conjunction with his petition. Petitioner respectfully requests that the argument advanced by Beigel in respect to the constitutional issue concerning his claim of being subjected to an unreasonable search and seizure and that the fruits of the search be suppressed, be considered in Lapi's petition for a writ of certiorari.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

Dated: April 10, 1967.

Respectfully submitted,

FRANK A. LOPEZ and
THEODORE ROSENBERG,
Attorneys for Petitioner,
133 Schermerhorn Street,
Brooklyn 1, New York.
Tel.: 212 UL 8-0589